No. 76-274

In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD LOUIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1976. The petition for a writ of certiorari was not filed until August 24, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On July 30, 1976, the court of appeals recalled its mandate and ordered that it be stayed for 30 days, but this does not affect the time for filing a petition for a writ of certiorari, which begins to run from the date of judgment. See Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether petitioner is entitled to have his perjurious grand jury testimony suppressed because of his alleged failure to understand the prosecutor's warning concerning his privilege against self-incrimination.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent prison terms of two years on each count, with all but the first six months suspended in favor of probation. On June 23, 1976, the court of appeals affirmed (Pet. App. A).

The evidence showed that in 1973 San Francisco police officers Gurnie Cook and George Koniaris were investigating gambling in the Chinatown area of San Francisco (Tr. 154-155, 320, 329). On several occasions, Cook and Koniaris entered petitioner's gambling parlor, where customers played Pai-Gow, Fan-Tan and Mah-Jong (Tr. 274-275, 230, 650). On March 26, 1973, Cook and Koniaris saw petitioner at his parlor; petitioner said that he had been looking for them and wanted to talk to them (Tr. 279-280, 331). He offered to pay money to the officers to let him operate his gambling business (Tr. 280, 217-218, 519).[2]

Between that date and September 1973, Cook and Koniaris received about thirteeen payments from petitioner, totalling $4,700, all of which was turned over to the F.B.I. (Tr. 215, 217, 237, 257, 334).

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[2]At another meeting petitioner asked Cook and Koniaris to enter other, competing gambling parlors, knock down their doors, run their customers out, kick over the tables, and search the "look-sees" in the alley (Tr. 224-225, 228, 337).

On September 6, 1973, petitioner testified before a special grand jury conducting an investigation to discover violations of 18 U.S.C. 1955 (operation of illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local law enforcement). Before testifying, appellant was given an oath, and the prosecutor explained his Fifth Amendment rights and the nature and consequences of perjury; the prosecutor also told petitioner that if he wished at any time to consult with his attorney, who was outside the grand jury room, the proceedings would be suspended so that he could do so.[3] Petitioner then denied that Pai-Gow and Fan-Tan were played at his parlor; he also stated that he had no knowlege of gambling in Chinatown and that he had never discussed gambling with any police officer; he further denied having given any money to police officers in 1973 (see Pet. App. vi-viii).

Petitioner admitted at trial that he had testified falsely before the grand jury as to these matters; he also admitted that at the time he testified he understood the import of his substantive testimony (Tr. 681, 719). He contended, however, that because of his difficulty with the English language he did not understand the prosecutor's explanation of his Fifth Amendment rights (*e.g.*, Tr. 66-67) and that he was therefore entitled to suppression of his grand jury testimony.

At trial, the district court instructed the jury that the question whether petitioner understood the prosecutor's warning was irrelevant to the case since, even if petitioner did not understand the prosecutor's explanation of

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[3]The warnings colloquy between petitioner and the prosecutor is set forth in the opinion of the court of appeals (Pet. App. v-vi, n. 6).

his Fifth Amendment rights, that "would not * * * constitute a legal defense or excuse for what would otherwise be perjury" (Tr. 808). On appeal, the court of appeals assumed without deciding that petitioner "did not fully comprehend the prosecutor's warnings" (Pet. App. ix) and, relying upon this Court's decision in *United States* v. *Mandujano,* No. 74-754, decided May 19, 1976, held that petitioner was nevertheless not entitled to have his perjured grand jury testimony suppressed.

DISCUSSION

All three opinions in *United States* v. *Mandujano,* No. 74-754, decided May 19, 1976, agree that, whether or not the prosecutor is constitutionally required to give some form of warnings to "putative defendant" grand jury witnesses, such a witness may not commit perjury and thereafter claim that the Constitution affords protection from prosecution for that crime. Petitioner contends (Pet. 5), however, that *Mandujano* does not apply to his case because, unlike Mandujano, he did not understand the warnings administered by the prosecutor before he testified falsely to the grand jury. Petitioner urges instead that his case will be controlled by *United States* v. *Wong,* No. 74-635, certiorari granted June 1, 1976. As we have noted in our brief in *Wong* (Br. 12-14),[4] the only arguably relevant factual distinction between that case and *Mandujano* is that the district court found that respondent Wong did not understand the warnings administered by the prosecutor before her grand jury appearance.

[4]Counsel for petitioner here is also counsel for respondent in *United States* v. *Wong* and thus has already been served with the government's brief in the latter case.

In contrast to the factual setting of *Wong,* there has been no finding in this case that petitioner did not understand the prosecutor's warning of his Fifth Amendment rights. We believe it is appropriate, however, for the Court to hold this case pending its disposition of *Wong.* The district court here did not find it necessary to resolve the question whether petitioner understood the prosecutor's warnings, since it believed that resolution of that factual issue was irrelevant to the question whether the perjurious grand jury testimony should be suppressed. For the reasons stated in our brief in *Wong,* we agree with this position. If the Court holds to the contrary in *Wong,* however, it would be appropriate to grant this petition, vacate the judgment, and remand the case for a determination of the factual question whether petitioner understood the prosecutor's explanation (or was otherwise aware) of his privilege against self-incrimination.[5]

[5]On the present record, petitioner's contention that he did not understand his privilege is implausible. Neither the trial transcript nor that portion of the grand jury transcript containing the warnings colloquy between petitioner and the prosecutor reveals any hint of the language problem that petitioner claims prevented him from understanding the prosecutor's warning concerning his Fifth Amendment privilege. Petitioner makes no claim that he did not understand the prosecutor's explanation of the purpose of the grand jury investigation, of his "right" to consult with counsel, or of the nature and consequences of perjury; nor does he assert that he misunderstood any of the substantive questions asked by the prosecutor during the proceedings. Indeed, petitioner conceded at trial that he had fully understood the import of his substantive testimony to the grand jury and had realized that his answers were false.

It is likewise undisputed that petitioner retained an attorney prior to his grand jury appearance and that, on the day of the grand jury hearing, his attorney was stationed immediately outside the grand jury room for the duration of the testimony. Once

It is therefore respectfully submitted that the Court should hold this petition for disposition in light of its decision in *Wong*.

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NOVEMBER 1976.

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inside the grand jury room, petitioner assured the prosecutor that he had consulted with his attorney concerning his grand jury appearance; the prosecutor advised him, moreover, that he could consult with his attorney before answering any question and that the proceedings would be suspended to give him an opportunity to do so (Grand Jury Tr. 4).

Finally, Officers Cook and Koniaris testified that petitioner had assured them two days before his scheduled grand jury appearance that he would not implicate them in his testimony (Tr. 313, 411-412), and, shortly after testifying, petitioner told the officers that he did not need any attorney since he was smarter than the people at the grand jury investigation (Tr. 427). The record also discloses that, prior to the grand jury hearing, petitioner entered a guilty plea to a gambling law violation and was represented by counsel on that occasion (Tr. 720). Accordingly, at the time of the grand jury hearing, petitioner was not unfamiliar with the criminal process and his constitutional rights.